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No. 99-1709

# In the Supreme Court of the United States

JAMES A. MCDERMOTT, PETITIONER

*v.*

JOHN A. BOEHNER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) for disclosing the contents of illegally intercepted communications, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, violates the First Amendment to the United States Constitution.

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 191 F.3d 463. The memorandum opinion of the district court (Pet. App. 46a-60a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 24, 1999. A petition for rehearing was denied on December 28, 1999 (Pet. App. 43a-45a). On March 8, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to April 26, 2000. The petition for a writ of certiorari was filed on April 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner James McDermott is alleged to have received a recording of an illegally intercepted telephone conversation from the individuals who intercepted the conversation, and to have disclosed the contents of that recording to members of the news media with knowledge that the information was illegally intercepted. Pet. App. 2a-3a. Those allegations, if taken as true, establish that petitioner violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* (Title III). The district court held that imposing civil liability on petitioner under Title III would violate the First Amendment. The court of appeals reversed.

1. Title III is a "comprehensive scheme for the regulation of wiretapping and electronic surveillance," *Gelbard* v. *United States*, 408 U.S. 41, 46 (1972), and is designed to "protect effectively the privacy of wire and oral communications." Pub. L. No. 90-351, Tit. III, § 801(b), 82 Stat. 211 (congressional findings). See also S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968) (1968 Senate Report); *Gelbard*, 408 U.S. at 48. Consistent with that goal, Title III broadly prohibits the interception of wire, oral, and electronic communications except where authorized through the mechanisms provided by Title III itself. 18 U.S.C. 2511(1)(a). Sections 2516 and 2518, in turn, set forth the procedures that must be employed, and the substantive criteria that must be met, before a wiretap or other form of electronic surveillance may be authorized under Title III. 18 U.S.C. 2516, 2518 (1994 & Supp. IV 1998). See also 18 U.S.C. 2511(2).

As enacted in 1968, Title III applied only to wire and oral communications. See Tit. III, § 802, 82 Stat. 212.

In 1986, however, Congress amended Title III to cover the electronic transmission of non-voice data such as electronic mail and other Internet communications, see 18 U.S.C. 2510(12) (1994 & Supp. IV 1998), and to clarify that Title III extends to communications on cellular and other wireless telephone systems, see 18 U.S.C. 2510(1). See also Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848; S. Rep. No. 541, 99th Cong., 2d Sess. 1-3, 7-8, 11 (1986).[1]

Because the interception of communications is generally a surreptitious and difficult-to-detect enterprise, the fact or source of such an invasion "[a]ll too often * * * will go unknown." 1968 Senate Report 69; see also *id.* at 96 ("[U]nlawful electronic surveillance is typically a clandestine crime."). In part for that reason, Congress determined that merely prohibiting unauthorized surveillance itself would not be sufficient. *Id.* at 69. Instead, Congress concluded that "[o]nly by striking at all aspects of the problem can privacy be adequately protected." *Ibid.*

Accordingly, Congress accompanied the prohibition on unauthorized electronic eavesdropping and interception with restrictions on the use of the fruits of such invasions. 1968 Senate Report 69. See, *e.g.*, 18 U.S.C. 2515 (unlawfully intercepted communications inadmissible as evidence). Section 2511(1)(c) makes it unlawful for any person to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any

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[1] Before the 1986 amendments, it was unsettled whether Title III's definition of "wire communication" reached the radio portion of cellular telephone communications. See, *e.g.*, *Edwards* v. *State Farm Ins. Co.*, 833 F.2d 535, 538 (5th Cir. 1987). ECPA makes it clear that Congress intended to bring cellular phone communications within the ambit of Title III. *Shubert* v. *Metrophone, Inc.*, 898 F.2d 401, 404-405 (3d Cir. 1990).

wire, oral, or electronic communication" if the person "know[s] or ha[s] reason to know" that it "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." Section 2511(1)(d) makes it unlawful for any person with the same knowledge or reason to know to "intentionally use[], or endeavor[] to use, the contents of any wire, oral, or electronic communication." Title III thus proscribes *all* unauthorized uses of the contents of illegally intercepted communications, including but not limited to their disclosure, by persons knowing or having reason to know of their unlawful interception.

Violations of Title III may be prosecuted as criminal offenses or result in the imposition of civil fines. 18 U.S.C. 2511(4) and (5). Title III also provides a private cause of action for any person whose communication is intercepted, disclosed, or used in violation of the statute. 18 U.S.C. 2520(a). In a civil action under Title III, a court may award such "relief as may be appropriate," including declaratory and injunctive relief, "actual damages" or prescribed statutory damages, and punitive damages "in appropriate cases." 18 U.S.C. 2520(b) and (c).

2. Respondent John Boehner is a Republican Member of the House of Representatives. In December 1996, Boehner participated in a telephone conference call with other Republican Members of the House, including then-Speaker Newt Gingrich. The conference call concerned ethics charges then pending against Speaker Gingrich in the House Ethics Committee. Boehner used a cellular telephone to participate in the conference call. Two individuals, John Martin and Alice Martin, intercepted the call using a police scanner and made a tape recording of the call. Pet. App. 2a-3a. In

so doing, the Martins violated Title III's prohibition on intentional interception in 18 U.S.C. 2511(1)(a).[2]

In January 1997, the Martins hand-delivered a copy of the tape recording to petitioner McDermott, who was then the ranking Democratic Member of the House ethics committee.[3] Pet. App. 3a. The tape was accompanied by a letter from the Martins to petitioner, which stated: "Enclosed in the envelope you will find a tape of a conversation heard December 21, 1996. * * * The call was a conference call heard over a scanner." The letter further stated: "We understand that we will be granted immunity." *Id.* at 4a, 63a. Petitioner took the tape from the Martins and told them that he would listen to it. Shortly thereafter, petitioner gave copies of the tape recording to the *New York Times* and other newspapers, which published articles reporting the contents of the conference call. *Id.* at 3a. Petitioner did so with the knowledge that, as indicated by the Martins' cover letter, the conference call had been intercepted in violation of Title III.

In March 1998, Boehner filed a private civil action against petitioner in the United States District Court for the District of Columbia under Title III and the Florida Security of Communications Act, Fla. Stat. Ann. § 934.03(1)(c) (West 2000). Pet. App. 4a, 49a. Boehner claimed that petitioner violated 18 U.S.C. 2511(1)(c) and the corresponding provision of the

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[2] The Martins later pleaded guilty to criminal charges under Title III and were fined as provided by 18 U.S.C. 2511(4)(b)(ii). Pet. App. 4a.

[3] The following facts are taken from the allegations in Boehner's complaint. Because the district court dismissed the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the allegations in the complaint must be taken as true for present purposes.

Florida statute by disclosing the taped contents of the conference call to the newspapers with knowledge and reason to know that the conversation had been intercepted unlawfully. Boehner sought statutory and punitive damages under 18 U.S.C. 2520 and the Florida statute. Pet. App. 4a-5a, 49a.

Petitioner moved to dismiss the complaint, arguing *inter alia* that the application of Title III and the Florida statute to his conduct would violate the First Amendment. Pet. App. 5a, 49a. In particular, petitioner argued that the First Amendment bars the imposition of liability on individuals who disclose the contents of unlawfully intercepted conversations concerning matters of public significance if they did not participate in or encourage the initial interception. *Id.* at 5a. In July 1998, the district court granted petitioner's motion. *Id.* at 46a.

The district court declared, at the outset, that petitioner's argument "is a slippery one, as it not only defends, but even encourages, the circumnavigation of wiretap statutes" like Title III. Pet. App. 51a. Under petitioner's theory, the district court explained, the government "has no means to prevent the disclosure of private information, because criminals * * * can literally launder illegally intercepted information," by "steal[ing] a conversation and giv[ing] it to someone else, who could then disseminate the information with impunity." *Id.* at 51a-52a. Thus, unless the dissemination of illicit recordings by individuals other than the initial eavesdropper can be prohibited, the court concluded, "the effect of the statute is diluted into nothingness." *Ibid.*

Nonetheless, the district court determined that applying Title III's disclosure provision to petitioner would violate the First Amendment. The district court

first held that 18 U.S.C. 2511(1)(c) is subject to strict scrutiny under the First Amendment when applied to the disclosure of illegally intercepted communications, about matters of "public significance," by persons who did not themselves participate in the illegal interception. Pet. App. 54a-56a (citing *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989)). In this case, the district court held, Section 2511(1)(c) does not survive strict scrutiny because the government interests are not sufficiently important. *Id.* at 57a-58a.

3. Respondent appealed, and the United States intervened in the appeal pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Title III. In September 1999, a divided panel of the court of appeals reversed the district court and remanded the case for further proceedings. Pet. App. 1a.

The panel majority held that the application of Section 2511(1)(c) to petitioner was subject to intermediate scrutiny rather than strict scrutiny. In a portion of the opinion (Pet. App. 8a-13a) authored by Judge Randolph and joined by Judge Ginsburg, see *id.* at 29a, 32a (Ginsburg, J.), the majority held that intermediate scrutiny is appropriate because Title III contains "generally applicable, content-neutral prohibitions on conduct that create incidental burdens of speech." Pet. App. 8a. Section 2511(c), the majority further explained, prohibits the disclosure of all illegally intercepted communications, without regard to the substance of the communication or the identity of the speaker or discloser. *Ibid.* Section 2511(c), the court added, evidences no interest in distinguishing among types of speech based on content or viewpoint. *Ibid.*

The court of appeals concluded that application of Title III to petitioner passes intermediate scrutiny because it (1) furthers an important government interest

unrelated to the suppression of free expression and (2) restricts speech no more than is necessary to further that interest. Pet. App. 8a. The government has a substantial interest, the court of appeals observed, in promoting speech by ensuring that electronic eavesdroppers do not threaten the privacy of conversations. *Id.* at 9a. "Interception itself is damaging" to that goal, the court explained, but "the damage [is] all the more severe when illegally intercepted communications may be distributed with impunity." *Ibid.*

The court also compared this case to a hypothetical case in which, rather than illegally intercepting a phone call, the Martins illegally break into respondent Boehner's office and steal a recording (hypothetically made by Boehner himself) of the conversation; the Martins then, according to the hypothetical, pass the stolen recording to petitioner. Pet. App. 11a. In such a case, the court explained, "there is no doubt that if [petitioner] knew how the Martins acquired the tape," *i.e.*, by breaking an entering and stealing it, "he could be prosecuted for receiving stolen property." *Ibid.* The court continued:

> With respect to [petitioner], it is hard to see any practical constitutional distinction between the hypothetical and the facts alleged here. In one case the Martins steal the tape; in the other, they illegally 'seize' the conversation.

*Id.* at 11a-12a. Just as the government can punish the receipt of stolen property to "dry up the market for stolen goods," the court of appeals held, so too Congress can forbid the "disclosure of the contents of illegally intercepted communications" to dry up the market for intercepted communications. *Id.* at 12a.

The court of appeals also concluded that Section 2511(c) goes no further than is essential to further the government's interest. "Unless disclosure is prohibited, there will be an incentive for illegal interceptions," and "the damage caused by an illegal interception will be compounded." Pet. App. 12a. As a result, the court of appeals concluded, "[i]t is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping." *Ibid.* Rather, it was "essential" for Congress to impose on those who were not responsible for the illegal interception, but who know or have reason to know that the communication was illegally intercepted, "a duty of nondisclosure." *Id.* at 12-13a.

Writing for himself, Judge Randolph also indicated that intermediate scrutiny was appropriate because petitioner was being sued for conduct, *i.e.*, for turning the recording of the communication over to the press, rather than for speech. Pet. App. 5a-7a (Randolph, J.). Judge Randolph further explained that this Court's decision in *Florida Star*, *supra*, is not controlling because (among other things) *Florida Star* specifically reserved whether the government could impose liability for the disclosure of "information that has been acquired *unlawfully* by a newspaper or a source." Pet. App. 16a (quoting 491 U.S. at 535 n.8) (emphasis added). In this case, Judge Randolph observed, the original source of the communication (the Martins) obtained it unlawfully. *Id.* at 17a.

In a separate opinion (Pet. App. 29a-32a), Judge Ginsburg agreed that intermediate scrutiny was proper because, in his view, petitioner "did not in fact lawfully obtain the tape." *Id.* at 29a. Judge Ginsburg observed that petitioner, at the time he accepted the tape, knew that the Martins were violating Title III by disclosing it to him, even if he was not violating Title III by

accepting it. "One who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information in any meaningful sense," he stated. *Id.* at 30a. Consequently, he concluded, *Florida Star* did not control the case and intermediate scrutiny was appropriate. *Id.* at 30a-31a.

Judge Sentelle dissented. Pet. App. 32a-42a. In his view, Title III's prohibition on disclosure is subject to strict scrutiny under a line of cases beginning with *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and ending with *Florida Star*, *supra*. Pet. App. 34a-37a. Although Judge Sentelle conceded that "there are distinctions" between this case and those, the distinctions do not, in his view, permit a difference in results. *Id.* at 37a. Instead, he reads this Court's cases as holding that statutes punishing the publication of truthful information of public significance are subject to strict scrutiny. *Id.* at 40a. Here, he concluded, the statute would not survive that level of scrutiny because it is not narrowly tailored to serve the government's compelling interest. *Id.* at 40a-41a.

## ARGUMENT

The court of appeals correctly rejected petitioner's First Amendment challenge to the application of Title III on the facts alleged in the complaint. The decision, however, is inconsistent with a decision of the United States Court of Appeals for the Third Circuit, which sustained a virtually identical First Amendment challenge to an application of Title III. See *Bartnicki* v. *Vopper*, 200 F.3d 109 (1999). The plaintiffs in that case as well as the government (which intervened to defend the constitutionality of Title III) have each filed a petition for a writ of certiorari, *Bartnicki* v. *Vopper*,

No. 99-1687 (filed Apr. 19, 2000); *United States* v. *Vopper*, No. 99-1728 (filed Apr. 27, 2000). In our view, the *Bartnicki* case is a better vehicle for review of the constitutionality of Title III's use restrictions under the First Amendment, and the Court's consideration of the constitutional issue in *Bartnicki* would not be significantly aided by undertaking plenary review of this case as well. The Court therefore should hold this petition pending disposition of the petitions in *Bartnicki*, Nos. 99-1687 and 99-1728.

1. In *Bartnicki*, the Third Circuit was presented with Title III claims growing out of the illegal interception and recording of a telephone conversation between two representatives of a local teachers' union, Gloria Bartnicki and Anthony F. Kane. In that conversation, the two discussed ongoing labor negotiations with the local school board. Those negotiations were highly contentious, and had been the subject of both public comment and extensive press coverage. 200 F.3d at 113.

The recording of the conversation was given anonymously to Jack Yocum, an individual who was opposed to the union's bargaining proposals. Yocum gave the recording to Frederick Vopper, the host of a local radio show. Vopper, in turn, played the recording during his show, which was broadcast by two radio stations. Bartnicki and Kane brought suit against media defendants (Vopper and the two radio stations), and a non-media defendant (Yocum), alleging violations of Section 2511(1)(c), which prohibits the disclosure of unlawfully intercepted communications, and Section 2511(1)(d), which prohibits all other uses of unlawfully intercepted communications. The district court denied a motion by the defendants for summary judgment on First Amendment grounds, but a divided panel of the Third Circuit reversed. As applied to disclosures of portions of inter-

cepted telephone calls containing information of public significance, the court of appeals held that Section 2511(1)(c) and (d) violates the First Amendment insofar as it prohibits "the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." 200 F.3d at 129.

Petitioner correctly claims (Pet. 22-26) that the decision in this case, which upholds Section 2511(c) against an almost indistinguishable First Amendment challenge, is difficult to reconcile with the decision in *Bartnicki*. See also 99-1728 Gov't Pet. at 15-17, *United States* v. *Vopper*, *supra*. Moreover, the constitutional issues addressed in these cases are important. Title III's restrictions on the disclosure and use of illegally intercepted communications are designed to protect the privacy and security of channels of private communication and thereby encourage the free and voluntary exchange of information and ideas. The Third Circuit in *Bartnicki* and the court of appeals in this case both correctly determined that the application of Title III to the claims before them warranted intermediate scrutiny, rather than strict scrutiny, under this Court's First Amendment precedents. See 99-1728 Gov't Pet. at 10-12 (explaining why intermediate scrutiny is appropriate). Having adopted the same standard of review, however, the two courts reached fundamentally different conclusions regarding the outcome of that review. For the reasons summarized in the government's petition for a writ of certiorari in the *Bartnicki* case, the Third Circuit's application of intermediate scrutiny analysis is unsound, 99-1728 Gov't Pet. at 13-15, and, if left uncorrected, will substantially undermine the efficacy of Title III as a means of protecting private communications, *id.* at 19-20.

2. Although both this case and the *Bartnicki* case present similar challenges to Title III, in our view *Bartnicki* provides a better vehicle for this Court's review. First, the First Amendment challenge in this case is somewhat narrower than the challenge in *Bartnicki*. In particular, respondent Boehner brought suit only against petitioner McDermott, the individual who disclosed the illegal recording to the news media; Boehner did not sue the members of the news media who published the contents of the recording. In holding that the application of Section 2511(1)(c) to petitioner did not violate the First Amendment, the court of appeals expressly declined to decide the constitutionality of Section 2511(1)(c) "as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." See Pet. App. 7a, 27a-29a.

In *Bartnicki*, in contrast, the plaintiffs brought suit not only against the non-media source of the intercepted communication, Jack Yocum, but also against the radio talk show host who played the tape on his show (Frederick Vopper) and the radio stations that broadcast that show. See 200 F.3d at 112. The First Amendment does not necessarily accord the media and private individuals different treatment. Compare Pet. App. 26a n.20 (stating that "the press has no greater First Amendment rights than anyone else"), with *id.* at 26a-27a (reserving the question of whether the media can be held liable for publishing the recording that petitioner gave them). The fact remains, however, that *Bartnicki* concerns the constitutionality of imposing liability not only on non-media defendants, but on media defendants as well; this case, in contrast, concerns only the constitutionality of imposing liability on the former.

This case is narrower than *Bartnicki* in another sense as well. Respondent Boehner asserted claims

only under Section 2511(1)(c), which bars the *disclosure* of communications obtained in violation of Title III. He did not assert any claims under Section 2511(1)(d), which bars all other *uses* of such communications. As a result, the court of appeals had no occasion to address the constitutionality of Section 2511(1)(d). In contrast, the plaintiffs in *Bartnicki* asserted both claims, and the court of appeals' decision there addresses the constitutionality of both Section 2511(1)(c) and Section 2511(1)(d). Consequently, the *Bartnicki* case provides this Court with a more comprehensive setting in which to evaluate the First Amendment implications of Congress's efforts to protect the privacy of communications under Title III.

3. The Court's consideration of these issues would not, in our view, be materially advanced by granting certiorari in both *Bartnicki* and in this case. Both cases concern intercepted cellular telephone conversations that contain discussions of matters of public concern. In *Bartnicki*, the intercepted and recorded communication concerned the teachers' union's highly contentious negotiations with the local public school board. In this case, the intercepted and recorded communication concerned the development of a response by political officials to an expected House Ethics Subcommittee announcement of an agreement between the Subcommittee and the Speaker of the House resolving an ethics investigation. Although the underlying facts of the two cases plainly differ, the cases do not differ in ways that appear to bear on the constitutional analysis. Both cases involve private communications about interaction with governmental bodies—communications that, in context, implicate matters of public concern. And in neither case was the party that disclosed or used the intercepted communication directly or indirectly in-

volved in the unlawful interception. As petitioner himself admits, "*Bartnicki* is indistinguishable from this case." Pet. 23. Nor do we see any advantages in having an additional factual scenario presented in a companion case that would outweigh the additional burdens and complications that would arise from potentially duplicative briefing and argument. To the extent that petitioner McDermott and respondent Boehner may wish to present arguments not otherwise developed by the parties in *Bartnicki*, they are free to present the Court with their views as *amici curiae*.

## CONCLUSION

The petition for a writ of certiorari should be held pending disposition of the petitions for a writ of certiorari in Nos. 99-1687 and 99-1728.

Respectfully submitted.

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